Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

VINCENT T. HERBERT,

Petitioner,

v.

ALMEIN CAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a federal circuit court of appeals have jurisdiction to hear an appeal from the dismissal of a habeas corpus petition under the statute of limitations when neither that court nor the district court has found that the petitioner has made a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253?

2. Should this Court's decision in *Houston v. Lack*, 487 U.S. 266 (1988), holding that a federal notice of appeal is filed on the date it is given to prison authorities, be applied in place of state filing rules in determining the period of tolling for state post-conviction applications under the habeas corpus statute of limitations?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is unpublished but appears at 2005 U.S. App. Lexis 4533 (2d Cir. March 17, 2005) (Jacobs, Sotomayer, and Hall, CJJ). The decision is reprinted in the appendix of this petition at pp. 7a-8a.

The memorandum decision of the United States District Court for the Eastern District of New York (Block, D.J.) dismissing the petition for a writ of habeas corpus as time-barred is unreported. It is reprinted in the appendix at pp. 1a-4a.

JURISDICTION

This petition for a writ of *habeas corpus* was filed in the Eastern District of New York invoking federal jurisdiction under 28 U.S.C. § 2254. On April 7, 2003, Eastern District Judge Frederick Block dismissed the petition as time-barred under the statute of limitations.

On March 17, 2005 the Second Circuit entered an order vacating the judgment and remanding the case to the District Court for proceedings consistent with the Second Circuit's order in this case and in *Fernandez v. Artuz*, 402 F.3d 111 (2d Cir. 2005), which was argued together with this case and decided the same day.

This petition for certiorari is filed within ninety days of the Second Circuit's order, and is therefore timely. Sup. Ct. R. 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2253(c) of Title 28 of the United States Code provides:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> (B) the final order in a proceeding under section 2255

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Section 2244(d) of Title 28 of the United States Code provides:

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. . . .

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the

pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Chapter 22, Section 600.2(a)(6) of the New York Code of Rules and Regulations provides in pertinent part:

All papers may be filed either by personal delivery or by ordinary mail. If filed by mail, they shall be considered filed only upon receipt: and the envelope must be marked "Motion Papers." If an acknowledgment of receipt of the papers is desired, there must be enclosed with the papers being filed by mail a self-addressed postage-prepaid postal card bearing the title of the cause, the nature of the motions, the date on which it is returnable, and a statement of the papers filed. Such postal card, when stamped and returned by mail, shall serve as a receipt for the papers listed thereon.

STATEMENT OF THE CASE

On November 15, 1995, respondent Almein Cain and four accomplices forced their way into a grocery store as it was closing and announced a holdup. Cain, while brandishing an Uzi semi-automatic machine gun, corralled the two store-owners and three patrons into a freezer in the back of the store. In the freezer, Cain ordered the victims to lie on the floor and, thereafter, opened fire with the Uzi, killing four of the five victims and severely injuring the remaining victim. Meanwhile, Cain's accomplices searched for and removed the store safe. Cain and his accomplices fled the grocery store with the safe, leaving the victims for dead.

A month-long investigation for the killers ensued. One of Cain's accomplices, while voluntarily at the precinct in connection with another matter, made a statement implicating himself and Cain in the murders. The only surviving victim later

identified Cain from a series of photographs and subsequently picked Cain out of a lineup. One of Cain's other accomplices was also arrested and confessed to the crime, implicating Cain.

State Court Proceedings

After a jury trial, Cain was convicted of eight counts of Murder in the Second Degree (N.Y. Penal Law § 125.25[1] and [2]), one count of Attempted Murder in the Second Degree (N.Y. Penal Law §§ 110.00/125.25[1]), and other related charges. He was sentenced on November 24, 1997.

On July 29, 1999, Cain perfected an appeal to the New York State Appellate Division, Second Department. On April 10, 2000, that court affirmed Cain's judgment of conviction. *People v. Cain*, 271 A.D.2d 542 (2d Dept. 2000). Cain's application for leave to appeal to the Court of Appeals was denied on June 20, 2000. *People v. Cain*, 95 N.Y.2d 833 (2000).

Cain did not apply to this Court for a writ of certiorari, and his time for doing so expired on September 18, 2000, 90 days after the denial of leave. His conviction became final on that date.

Before the conviction became final, on August 24, 2000, Cain filed a *pro se* motion, pursuant to section 440.10 of the N.Y. Criminal Procedure Law, seeking to vacate his judgment of conviction. On October 30, 2000, the Supreme Court, Queens County, denied Cain's motion in its entirety. On November 28, 2000, Cain sought permission from the Appellate Division to appeal from the denial of his section 440.10 motion. That application was denied on February 5, 2001.